

REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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15-4564

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JOHN H. DAVIS

Appellant

v.

ROBERT A. MCDONALD  
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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## **APPELLANT'S REPLY ARGUMENT**

**The Board failed to assist Mr. Davis in the development of his claim because it relied on the inadequate September 2008 VA examination.**

Mr. Davis argued that the Board erred when it relied on an examination that failed to adequately consider whether his service connected left knee disability aggravated his neck disability. *Apa. Op. Br.* 5-7. The Secretary concedes that the September 2008 examiner did not discuss whether Appellant's fall may have aggravated his neck condition, nor did the Board. *Sec. Br.* at 5.

The Secretary's argument rests entirely on his opinion that "Appellant is arguing that the Board erred by failing to read his mind, by failing to anticipate and proactively consider and develop a theory that he would raise for the first time on appeal to this Court. The Board had no obligation in this regard." *Sec. Br.* at 10. The Secretary misses the point entirely.

Secondary service connection is warranted when the evidence demonstrates that the disability is proximately due to, or the result of, a Veteran's service connected disability *or* when a non-service connected disease is aggravated by a service connected disability. 38 C.F.R. § 3.310 (2016); *Allen v. Brown*, 7 Vet.App. 439 (1995). Since the Veteran made a claim for secondary service connection, he was entitled to the assistance of VA in developing the facts pertinent to his or her claim. 38 U.S.C. § 5103A(a)(1); *see McLendon v. Nicholson*, 20 Vet.App. 79, 85 (2006) (noting that "it is the Secretary who has the affirmative, statutory duty to assist the veteran in making his

case.”). Furthermore, contrary to the Secretary’s suggestion, a medical opinion regarding secondary service connection must address the issue of aggravation to be adequate. *El-Amin v. Shinseki*, 26 Vet.App. 136, 140 (2013) (emphasis added).

Mr. Davis asserted that his neck injury “occurred...when I fell and my left knee gave out.” R-982. With this statement he raised the issue of service connection on a secondary basis. There is no requirement in the law that he specifically articulate that the fall caused the injury to his neck or whether it aggravated a neck condition. *See* 38 C.F.R. 3.310 (2016). The Secretary avers that this statement “clearly and unambiguously states that the fall caused the neck injury” and the Board had no duty to discuss aggravation. Sec. Br. at 7. However, the Veteran first reported neck pain in November 2004. R-3066. This pain reasserted itself after he fell due to his left knee in 2005. R-756. It is possible that his fall reinjured the neck, thus aggravating the condition. Contrary to the Secretary’s assertion, Mr. Davis was not specifically required to raise the theory of secondary service connection based on causation or aggravation. Sec. Br. at 8. Rather, it was enough that he claimed his neck condition was secondary to his knee condition. R-982.

As the entirety of the Secretary’s argument rests on his mistaken belief that the Veteran was required to specifically raise the theory of secondary service connection based on aggravation, he failed to address Mr. Davis actual arguments that the September 2008 examination was inadequate and the Board provided inadequate reasons or bases in this regard. *See* Apa. Op. Br. 5-10; Sec. Br. 5-10. More

importantly, he concedes that the September 2008 examination did not address aggravation at all. Sec. Br. at 5. By not explaining why the Board was permitted to rely on this examination, the Secretary concedes, that the Board failed to provide adequate reasons or bases for its reliance on this inadequate examination. *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) (Court noting that where the Secretary fails to respond appropriately, “the Court deems itself free to assume, and does conclude, the points raised by appellant, and ignored by the General Counsel, to be conceded.”). As such, remand is necessary.

## **CONCLUSION**

The Board failed to assist Mr. Davis in the development of his secondary service connection claim because the VA examination on which it relied did not adequately inform the Board on the relevant medical question of aggravation. The examination focused solely on direct causation, rather than whether the service-connected left knee disability aggravated Mr. Davis’s arthritis of the neck.

The Board also provided inadequate reasons or bases for its denial service connection based on aggravation. The Board relied on a VA examination that only addressed the origin of arthritis of the neck, and erroneously required that the origin of the increase in disability be “acute or traumatic.”

Based on the foregoing reasons, as well as the arguments contained in the Appellant’s opening brief, the Court should vacate the Board’s decision and remand

the appeal with instructions to readjudicate the claim in accordance with the Court's opinion.

Respectfully submitted,

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By His Representatives,  
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